

February 23, 2010

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Empowering Parents and Protecting Children in an Evolving Media Landscape,
MB Docket FCC 09-94**

Dear Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker:

The Food Marketing to Children Workgroup (FMC Workgroup) respectfully submits comments in response to the Federal Communications Commission's (FCC's) Notice of Inquiry (NOI) in the matter of Empowering Parents and Protecting Children in an Evolving Media Landscape (MB Docket No. 09-194) that was adopted October 22, 2009,¹ posted in the *Federal Register* on November 24, 2009,² and for which the public comment deadline was extended until February 24, 2010.³

The FMC Workgroup represents more than 120 individuals and organizations in the United States who are concerned about the proliferation of food and beverage marketing targeting children and adolescents. We are a national collaborative, chaired by the Center for Science in the Public Interest (CSPI) and the Berkeley Media Studies Group (BMSG), which has convened regularly since 2007. We are comprised of experts and leaders in nutrition, public health, advertising and marketing, consumer protection, public policy, child development, government and civil society. We share important research to inform policies and programs at national, state and local levels to promote healthful diets and healthy lifestyles to prevent obesity and promote healthy eating for children and adolescents. We actively identify and investigate practices that lead to unhealthy diets and lifestyles (including sedentary behaviors linked to physical inactivity) for children and adolescents, and we recommend effective ways to modify those practices.

The FMC Workgroup members appreciate the opportunity to submit comments to the Commission to help guide future policies and actions by the Commission and inform other agencies. In this document, we offer information relevant to seven areas: (1) media use by children and adolescents, (2) benefits of electronic media, (3) effectiveness of current self-regulatory efforts for marketing to children and adolescents, (4) risks of electronic and digital media to children and adolescents, (5) strengths and limitations of media literacy, (6) relevance of the First Amendment of the U.S. Constitution to regulating food marketing to children, and (7) effective coordination of government efforts to protect children and adolescents in an evolving digital media and marketing landscape.

We acknowledge that media in many different forms can influence the healthy development of children and adolescents. As a coalition, we are concerned about their exposure to advertising and other marketing for food and beverage products of poor nutritional quality. Although there have been modest improvements in the type of products marketed to children and

adolescents over the past few years, the overwhelming majority are for foods and beverages of poor nutritional quality.^{4,5}

We are concerned about newer forms of electronic and digital media that are usually not explicitly addressed by companies' voluntary policies, and are not adequately regulated by federal agencies, including the FCC and Federal Trade Commission (FTC). Interactive digital and social media are increasingly being used by companies and marketers to promote branded food and beverage products contributing to unhealthy diets and unhealthy lifestyles for American children and adolescents.⁶ These practices contribute to young people's risk of developing overweight, obesity and nutrition-related chronic diseases.

Overweight and obesity are the leading public health problems for young people in the United States today. About one third of children and adolescents, ages 2 to 19 years, and 9.5 percent of infants and toddlers under the age of 2 years are affected.^{7,8} These trends translate into serious and costly chronic-disease risks. A child born in the United States today has a 1 in 3 risk of developing type 2 diabetes,⁹ and a 1 in 5 risk of having an abnormal blood lipid level.¹⁰ About 1 to 2 million adolescents (3.5%) have the metabolic syndrome,^{*} which is 16 times higher in overweight or obese adolescents.¹¹ Between 2002 and 2005, the number of children and adolescents, ages 5 to 19 years, who took medication for type 2 diabetes doubled.¹²

The Institute of Medicine (IOM) conducted a comprehensive review of research on the influence of food marketing to children, which concluded that television (TV) food and beverage advertising[†] affects children's choices, purchase requests, diets and health.¹³ Additionally, the IOM committee concluded that the foods and beverages marketed to children and adolescents are out of balance with current dietary recommendations. For example, a recent study conducted by the Rudd Center at Yale University found that children consumed 45% more food when exposed to food advertising on TV. The results demonstrate that food advertising can promote automatic eating behaviors and influence more than brand preference alone.¹⁴

Companies spent approximately \$2 billion in 2006 on marketing foods and beverages to children, which includes toy give-aways with children's meals at fast-food restaurants.¹⁵ Companies market food to children through traditional media such as TV, radio, magazines, product packaging, and in-store displays and promotions. Companies also use many other approaches, such as the Internet and other new electronic media, ads in movie theaters, school-based marketing, product placement in movies and video games, marketing in amusement parks, food-themed toys, clothing and other merchandise, and almost anywhere a logo or product image can be shown. Food marketing techniques include the use of spokescharacters, celebrities, cartoons, children's meals and menus, premiums (such as toys or other items distributed in product packaging, with restaurant meals, through contests, or redeemable via coupons, codes or proof of purchase), games, contests, kids' clubs, viral marketing and event sponsorship.

^{*} While the metabolic syndrome is defined differently by various expert groups, all agree that it increases the risk of developing cardiovascular diseases. This review defined it as consisting of three out of five biological abnormalities in adolescents (i.e., elevated fasting blood glucose, elevated waist circumference, elevated triglyceride, elevated blood pressure and low high-density lipoprotein (HDL) or "good cholesterol").

[†] Television is the dominant form of media used by children and also the form most studied and published on in the peer-reviewed literature.

The primary reason why food and beverage marketing has a detrimental effect on children's and adolescents' diets and health is that the overwhelming majority of marketing to young people is for foods and beverages of poor nutritional quality.¹³ A study of Saturday morning children's TV found that 91% of the advertisements promoted foods that were high in saturated fat, added sugars, or sodium, or low in fruits, vegetables, or key nutrients.¹⁶ A 2000-calorie diet of advertised foods would exceed recommended daily values for total fat, saturated fat, and sodium and provide nearly one cup of added sugar.¹⁷ Carbonated beverages, fast food, and breakfast cereals make up 63% of the total amount spent on marketing to children and adolescents.¹⁵

Parental authority is undermined by the wide discrepancy between what types of foods and beverages parents tell their children is *healthful to consume* and what marketing promotes as *desirable to consume*. In addition, while many parents have limited proficiency in nutrition, companies have extensive expertise in persuasive techniques. They are able to hire psychologists and research firms to conduct marketing and neuroscience research to determine how to most effectively influence children's and adolescents' food preferences and choices. Companies encourage children to choose foods for fun and social acceptance, not for their nutritional or health value.¹⁸ Companies also have ready access to techniques to affect children's food choices that parents do not have, such as cartoon characters, contests, celebrities, and toy give-aways. Parents, bear the primary responsibility for feeding their children. Most parents try to get their children to eat a balanced and healthful diet, but billions of dollars spent on marketing low-nutrition foods to children makes it exceedingly difficult.

Excessive recreational screen-time exposure[‡] above the recommended level (2 hours/day for children over 2 years) is also a major concern with the current electronic and digital media used because it (1) increases young people's exposure to advertising and marketing messages, which are integrated across diverse media platforms and promote overconsumption of foods and beverage products contributing to unhealthy diets; and (2) leads to unhealthy weight gain when combined with physical inactivity. Additionally, American children and adolescents are far too sedentary, a key factor contributing to young people's increased risk for overweight, obesity and related chronic diseases.

1. Media Use by Children and Adolescents

As the NOI noted, children and adolescents today live in a media-saturated environment that is very different from the ones in which their parents grew up a generation ago. Children's physical activity levels are below recommended levels, whereas their calorie intakes are above recommended levels. There is a sizable gap between what experts recommend and children's and adolescents' eating habits and activity levels, which is producing adverse effects on their health and educational outcomes.

[‡] Recreational screen-time exposure includes the total number of hours that a child watches or uses electronic or digital media. Those include broadcast and cable TV, video and/or digital video disc (DVD), movies, computers, hand-held videogames and cell phones.

The American Academy of Pediatrics (AAP) recommends *no screen time* for children under 2 years of age and that TVs and other screens be removed from the primary place where all children sleep.¹⁹ This is not the reality. One study examined media access and use among American infants, toddlers and young children, from birth to age 6 years, to assess how many of them fall within the AAP media-use guidelines. The study found that many infants and toddlers (20% of 0- to 2-year-olds) and more than one-third of young children (ages 3-6 years) have a TV in their bedroom. The most common reason given by parents or caregivers is that it frees up TVs in the household so that other family members can watch their own TV shows (54%). **Seventy percent of 0- to 2-year-olds do not meet the AAP media-use guidelines (i.e., no screen time).**²⁰

The AAP and the IOM recommend that children older than 2 years limit their recreational screen-time exposure to no more than 2 hours/day to encourage a healthy weight.^{21,22} The majority of children ages 3 to 6 years meet these media-use guidelines. On a typical day, 75% of children watched television and 32% watched videos/DVDs for an average of one hour and 20 minutes. New media are making inroads with young children: 27% of 5- to 6-year-olds used a computer (for 50 minutes on average) on a typical day.²⁰

Today, nearly 24.4% of children, ages 2-5 years, are either overweight or obese. The preschool period is a critical time for young children's growth and development. Research conducted on American preschoolers, ages 2-5 years, found that watching more than 2 hours/day of TV/videos was associated with a higher body mass index (BMI), reflecting an increased risk of becoming overweight or obese.²³ Establishing healthy eating habits and encouraging daily active play and limited sedentary behavior (including moderating TV viewing and screen-time exposure) will help prevent obesity and cultivate lifelong healthy behaviors.

In the US, nearly 74% of children ages 3-6 years are in some form of non-parental care and just over 50% are in center-based child care.²⁴ A study of 168 child-care programs found that 70% of home-based programs and 36% of center-based programs allowed children to watch TV.²⁵ It is important to note that research shows preschool children's TV viewing in child-care settings is significantly underestimated when compared to actual exposure. Child-care providers need to be supported to facilitate healthful eating, to promote physical activity, and to limit recreational screen-time use among young children. A national evaluation of state child-care regulations found that most states had few regulations related to obesity for child-care centers and family child-care homes, leaving much room for improvement. Compared to model regulations for healthy eating, physical activity, and screen time exposure, states were meeting only about 3 out of 20 regulations.²⁴

Research also shows that school-aged children who meet *both* physical activity recommendations (1 hour of moderate-to-vigorous physical activity/day) and screen-time recommendations (2 hours/day) are less likely to be overweight or obese. Children not meeting the physical activity or recreational screen-time recommendations are 3-4 times more likely to be overweight or obese than children complying with both recommendations.²⁶

Kaiser Family Foundation Study on Children's Media Use. The FCC's NOI acknowledged several important studies of electronic media usage that have been released by

The Henry J. Kaiser Family Foundation (KFF) since 2003. These studies clearly document that media multi-tasking has become the norm for children and adolescents—even for very young children from birth to age 5, before they even enter school.^{27,28,29}

In January 2010, the KFF released a pivotal study documenting current media use trends among older American children and adolescents, ages 8 to 18 years.³⁰ The report included data from 1999, 2004 and 2009. These data are based on large-scale, nationally representative surveys and are among the largest and most comprehensive publicly available sources of information about American children's and adolescents' media use.

The first important finding of the 2010 KFF study is that the average amount of media multi-tasking that children and adolescents engage in is about 7.5 hours/day.

African-American and Hispanic children spend far more time with media compared to white children. African-American children spend nearly 6 hours/day watching TV, compared to 5.5 hours/day for Hispanic children, and 3.5 hours/day for white children. The study found that the racial disparity in media use has grown substantially over the past five years. The gap between African-American and white youth was just over 2 hours/day in 2004 but increased to more than 4 hours/day in 2009.

The 2010 KFF study also found that mobile media devices are driving the increase in young people's media use. The increase in media use is driven largely by ready access to mobile devices, including cell phones and iPods. Over the past five years, there has been a huge increase in young people's ownership of these electronic devices. It increased between 2004 and 2009 from 39% to 66% for cell phones, and from 18% to 76% for iPods and other MP3 players. Young people now spend more time listening to music, playing games, and watching TV on their cell phones. While the amount of time spent watching traditional TV declined from 2004 to 2009 by about 25 minutes/day, the new ways to watch TV—on the Internet, cell phones and iPods—actually led to an increase in total daily TV watching among young people.

The 2010 KFF study also revealed the ubiquitous presence of multiple forms of electronic media use by children and their families within the home. An estimated two-thirds (64%) of young people report that the TV is usually on during meals, and just under half (45%) say the TV is left on “most of the time” in their home, even if no one is watching. Seven in ten (71%) have a TV in their bedroom, and half (50%) have a console videogame player in their own room. The study found that few parents have clear media use guidelines for their children. About three in ten young people say they have rules about how much time they can spend watching TV (28%) or playing videogames (30%), and 36% say the same about using the computer. When parents actually establish media-use limits, their children spend less time with media; those with *any* media rules consume nearly 3 hours less media per day than those with no rules.

The FMC Workgroup recommends that the Commission work with other federal agencies to develop a national strategy to reduce children's and adolescents' total screen-time exposure. The national strategy should draw from several sources, including the Surgeon General's Vision for a Healthy and Fit Nation³¹ and the Centers' for Disease Control and Prevention (CDC's) Expert Panel on Children, Television Viewing and Weight Status recommendations, which identifies ways to mitigate the negative effects of recreational screen-

time exposure on children to reduce their obesity and chronic-disease risks.³² The national strategy should encourage reducing screen time and sedentary behaviors, as well as eliminating children's and adolescents' exposure to advertisements and marketing for high-calorie and nutrient-poor food and beverage products that contribute to unhealthy diets.

Components of this national strategy should include:

- (1) School-based curricula should be broadly disseminated and implemented to reduce children's total recreational screen-time use.
- (2) Health-care professionals should receive training and counsel families on reducing children's media use.
- (3) States should include and enforce policies limiting screen time as a part of child-care licensing requirements. Staff working at child-care centers should be trained on and adhere to guidelines for TV viewing and other screen time.
- (4) Parents/caregivers should remove TVs from children's bedrooms and should encourage amounts of recreational viewing consistent with the AAP recommendations and monitor screen media watched, budget TV time, foster media literacy, and help children choose appropriate programs/media to view. Families should also turn off the TV while eating meals.

2. Benefits of Electronic Media

As noted in the FCC NOI, electronic and digital media may provide benefits to advance children's learning and health.¹ Technology and digital media can be part of the solution to reduce childhood obesity, for example it can be used strategically to promote physical activity. The use of active videogames (e.g., Nintendo's Wii, the Sony Eye Toy, and Dance Dance Revolution) may be promising approaches to convert children's and adolescents' sedentary screen time to active screen time. One study suggests that playing active videogames on a regular basis may have positive effects on children's overall physical activity level. However, further research is needed to confirm if playing active videogames over a longer period of time could produce positive effects on children's BMI³³ to move it into a healthy weight range.

HopeLab's Ruckus Nation[§] is another example of an innovative way to promote physical activity, which started as a competition to generate ideas for new products by children for children.³⁴ Before initiating product development, HopeLab conducted in-depth interviews with tweens (ages 11-14 years) across the United States to better understand the drivers and barriers to physical activity in their daily lives. The focus group results provided distinct profiles of tween behaviors and core design principles that informed HopeLab's work.³⁵ The first physical activity product in development at HopeLab is called gDitty—a specially designed activity monitor optimized to record tween physical activity levels, combined with a website where children and adolescents can redeem physical activity points for non-food rewards they choose (e.g., a T-shirt or a donation to a charity organization). A first-generation gDitty prototype is now being evaluated in small-scale pilot studies.^{34,36}

[§] Ruckus Nation is a global idea competition to encourage children and adolescents to be physically active. Supported by the Robert Wood Johnson Foundation, HopeLab develops prototypes based on the best ideas submitted through this national competition, which are turned into products and distributed broadly.

However, we have serious concerns about food and beverage companies promoting physical activity. Physical activity and healthy lifestyle messaging should not be used to promote foods and beverages of poor nutritional value or as a tactic to divert attention from making meaningful and genuine changes to their marketing practices or reformulating their products.

We question digital media's ability to adequately promote healthy eating behaviors. The Commission requested information concerning whether advertisements and marketing for healthful food and beverage products could produce positive effects for children and adolescents. We believe that such potential exists, but currently healthy eating marketing campaigns are not being implemented by food, beverage, and entertainment companies at the scale and with strong enough messaging to produce meaningful changes in children's diets or health. In 2005, the IOM Committee on Food Marketing to Children and Youth concluded that food and beverage marketing practices reaching children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk.¹³ The FMC Workgroup supports the IOM conclusion and we believe that there is potential for food and beverage companies to use their creativity, vast resources and full range of marketing practices to promote and support healthful diets for children and adolescents. However, that potential is currently not being realized.

3. Effectiveness of Industry Self-Regulation for Marketing to Children and Adolescents

The NOI acknowledged the Council of the Better Business Bureau's (BBB's) Children's Food and Beverage Advertising Initiative (CFBAI)—an industry self-regulatory program for food marketing to children. The CFBAI aims to shift the mix of advertising messaging directed to children under 12 toward healthier dietary choices and healthy lifestyles. The Commission requested information about whether voluntary industry efforts have effectively curtailed the advertising of food and beverage products with unhealthy nutrition profiles to children, and whether the commitments extend beyond TV to other media platforms including, the Internet and mobile devices. The Commission also requested whether additional actions are needed to address concerns.

The two CFBAI progress reports released in 2008 and 2009 reveal that participating food and beverage companies are highly compliant in meeting their individual pledges.^{37,38} Although 16 leading food companies, representing about two-thirds of TV advertising revenue to children belong to the CFBAI, several recent independent evaluations of company advertising and marketing practices show that only incremental progress has been made in changing what foods are marketed to children.

The collective results from several independent evaluations of the prevailing industry self-regulatory efforts are summarized below. The FMC Workgroup recommends that the FCC support the FTC efforts to work with food and beverage manufacturers, restaurants, and especially entertainment companies (given FCC jurisdiction over media company practices) to encourage all companies to adopt or strengthen existing food marketing policies. The FCC also should open a rulemaking proceeding to examine what more it can do to address food marketing to children within its current statutory authority.

As needed, Congress should enhance the FCC's ability to regulate with the goals of protecting children and empowering parents.

Digital Marketing: A 2009 Internet content analysis examined how food marketers use advergames, custom-built and branded online games, to promote food products to children and the nutritional content of the food products featured in the advergames. The results reveal that food marketers continue to use advergames heavily, with candy and gum or food products high in sugar most frequently appearing in the analyzed games. Children are often invited to play with the foods integrated as active game components. Despite the potential educational benefits of interactive games, fewer than 3% of the 251 games analyzed in this study appeared to educate children about nutrition and health issues.³⁹ A smaller study used a content analysis to assess food marketing on 10 popular children's websites after the release of the IOM food marketing report in 2005. The study found that seven of the ten websites marketed candy, cereal, snack and quick-serve restaurant products.⁴⁰

The Rudd Center Study of Children's Cereals:⁴¹ In October 2009, a Rudd Center study concluded that the least healthful cereals are the ones most marketed to children. Overall, children are exposed to a vast amount of marketing for highly-sugared cereals, more than for any other category of packaged food. The study also found that efforts made by companies to reformulate cereals have been limited. Most cereals marketed to children are high in sugar, high in sodium, and/or low in fiber. The investigators found that 11 of the 13 cereals advertised most to children on TV are also marketed heavily on the Internet. Not one children's cereal qualified for inclusion in the food packages for the U.S. Department of Agriculture's (USDA's) Women, Infants and Children (WIC) program.

The Center for Science in the Public Interest (CSPI) Study of Company Standards for Marketing Products to Children:⁵ In November 2009, CSPI released a study analyzing the nutritional quality of food and beverage products that companies approved for marketing to children, and tracked changes in the nutritional quality of foods and beverages marketed to children over time. The study found that approved products that companies identify as appropriate to market to children met each company's own standards. However, the majority (59%) of approved products did not meet a single, third-party (CSPI's) nutrition standard. The approved products from Burger King, Nestlé, Dannon and ConAgra met CSPI's nutrition standards. The majority of products approved for marketing to children under 12 years of age by PepsiCo, Kraft Foods, McDonald's, General Mills, Kellogg, Unilever and Campbell failed to meet CSPI's nutrition standards.

CSPI's study also found that the advertisements that aired on Nickelodeon, the most popular children's TV station, are still primarily for foods of poor nutritional quality. The percentage of advertisements for high-calorie and low-nutrient foods decreased only slightly between 2005 and 2009 (before and after the CFBAI was implemented) from about nine in ten (88%) to eight in ten (79%) food advertisements. The decrease was not statistically significant. While the percentage of advertisements for foods exceeding the recommended limits for total fat, saturated plus *trans* fat, and sodium *decreased*, the percentage of ads for foods exceeding the recommended limit for added sugars *increased*. The number of advertisements for foods that exceeded two or more limits for problem nutrients dropped from 29% of food advertisements in

2005 to 10% of food advertisements in 2009 (excluding brand advertisements). One-quarter of Nickelodeon's TV food advertisements were from companies that do not participate in the CFBAI. Almost no advertisements from non-CFBAI companies met CSPI's recommended nutrition standards for food marketing to children, while 28% of advertisements from CFBAI companies met the standards.

Children Now's Study of the Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised to Children on TV:⁴² In December 2009, Children Now released a study that examined the nutritional quality of the products advertised to children on TV. The study reported that 68.5% of all advertising to children by companies participating in the CFBAI were for the lowest category of nutritional quality for food and beverage products. Known as "whoa" foods, these products should be consumed only on "special occasions" such as children's birthdays, according to standards developed by the U.S. Department of Health and Human Services. About one third (31%) of the companies' advertisements to children were for "slow" food and beverage products, which have moderate nutritional value, but should be consumed only "sometimes, or at most several times a week." There was very limited advertising of "go" food and beverage products, such as vegetables and fruits. Comparing the advertising landscape from before the CFBAI initiative was implemented in 2007 and after its implementation, the study showed only a negligible improvement in the nutritional quality of foods marketed to children on TV.

University of Illinois at Chicago Study on TV Advertising: Another study is currently underway to assess the nutritional content of food products viewed on TV by children ages 2-11 years of age before the CFBAI was implemented, which showed that the majority of food-product advertisements seen on TV by American children and adolescents were of poor nutritional content,⁴³ and after the company pledges took effect. Preliminary results suggest that while food advertising has declined for younger children, ages 2-11 years, it has increased for adolescents, ages 12-17 years. Additionally, while advertisements for sweets, snacks and beverages have decreased, fast-food advertisements have increased.⁴⁴

CSPI's Food-Marketing Policy Report Card: In March 2010, CSPI is releasing the results of a study that examined whether food and beverage manufacturers, restaurants and entertainment companies that market food and beverages to children have adopted a policy on marketing, and if they do, CSPI assessed the adequacy of that policy. The study examined the policies of 128 companies. Results showed that two-thirds (68%) did not have a policy for food marketing to children. A much larger proportion of food and beverage companies (64%) had marketing policies than did restaurants (24%) or entertainment companies (22%).

Of special interest to the Commission, the food and beverage company policies were either non-existent or weaker for digital marketing. Eight in ten (78%) entertainment companies did not have a food marketing policy to children. When the policies existed, they were generally more limited in scope than were the policies of food and beverage manufacturers. If entertainment companies had a marketing policy, it most likely addressed the use of licensed characters. Entertainment companies' policies were generally weaker or did not exist for TV, radio, print, company websites, other digital media, and product placement. For example, the

Cartoon Network applied nutrition standards to the licensing of its characters, but not to its TV advertising or website, which are the primary means by which it markets to children.

The CSPI study documented that food, beverage, restaurant and entertainment companies have not complied with the FTC's recommendation to standardize nutrition criteria for marketing to children. What is apparent is that each company uses a different set of nutrition standards, which is confusing to families and consumer advocates. Due to the variation in nutrition standards and marketing policies across companies, Congress required the FTC to convene a federal Interagency Working Group on Food Marketed to Children to develop standard nutrition guidelines for companies to use for marketing foods and beverages to American children and adolescents, ages 17 and younger. The group consists of representatives from the CDC, USDA, FTC and the U.S. Food and Drug Administration (FDA). Draft nutrition standards were released in December 2009 at a workshop held in Washington, DC.⁴⁵ The federal interagency group will seek public comment on the draft standards and will send a final report with its recommendations to Congress by the end of July 2010.

Consumers International Study on Global Marketing Policies: The lack of nutrition standards for marketing to children and adolescents is not unique to the United States. Since many of the largest food and beverage companies market in various regions of the world, it is important to assess what type of advertising and marketing practices they support in other countries. Consumers International evaluated the marketing practices of the top 10 global food and beverage companies in the world in a report that was released in March 2009. The Consumers International assessment found that the leading transnational food and beverage companies have not yet made explicit global commitments to include responsible marketing practices to children on company websites, packaging and point-of-sale materials, the Internet, mobile phones, interactive and other new forms of digital media marketing practices to children worldwide.⁴⁶

The World Health Organization (WHO) has prioritized marketing to children on its 2010 agenda for the annual World Health Assembly meeting. If voluntary, industry self-regulatory measures are not successful in reducing the marketing of food and beverage products that contribute to unhealthy diets, unhealthy lifestyles, and unhealthy weight gain among children worldwide, then international advocacy groups and member states are expected to urge WHO to use stronger regulatory approaches, such as developing and enforcing an International Code on Marketing Food and Non-alcoholic Beverages to Children.⁴⁷

In summary, we believe that in order for self-regulation of food marketing to children to be effective:

- All food and beverage manufacturers, restaurants, and entertainment companies that market to children should have a written food marketing policy that is readily available to the public. Companies that do any marketing to children, even if not during children's TV programming, should have a marketing policy.
 - Although its program conditions are not ideal, all companies should belong to the CFBAI, since its member companies' policies are generally clearly spelled out,

available in one place for public viewing, and compliance is monitored by the CBBB.

- The CBBB and entertainment companies should work together to develop a set of entertainment-company-specific criteria for the CFBAI, and entertainment companies should join the CFBAI.
- All companies should use a uniform set of strong nutrition standards because most companies selectively use different standards that benefit their product. The federal Interagency Working Group will provide guidance on this issue in 2010 through its congressional report.⁴⁵
- Company marketing policies should cover all approaches used to market to children. Many companies especially need to strengthen their policies for digital marketing, on-package/in-store promotions, and practices in elementary, middle, and high schools.
 - Companies should adopt a uniform set of definitions for marketing "directed to children." A set is expected to be recommended by the Interagency Working Group on Food Marketed to Children.

4. Risks of Electronic and Digital Media to Children and Adolescents

Advertising and marketing are ubiquitous in children's and adolescents' environments and produce negative influences on their dietary preferences, eating behaviors and health outcomes. This exposure may contribute significantly to childhood and adolescent obesity, and cigarette and alcohol use.⁴⁸ Young people view more than 40,000 TV advertisements per year and they are increasingly being exposed to new forms of integrated marketing that includes product placement across diverse media, school-based marketing, digital TV, mobile phones, Internet-based advergames, social networking sites, and viral marketing.^{13,49,50,51}

The Berkeley Media Studies Group (BMSG), the Center for Digital Democracy, and the National Policy and Legal Analysis Network (NPLAN) to Prevent Childhood Obesity commissioned several papers in 2009 to examine the impact of digital media and marketing on children and adolescents. We encourage the Commission to review these papers to gain a better understanding of the research on target marketing of ethnically and racially diverse communities, privacy concerns, and implicit persuasion techniques used by food and beverage companies to reach young people.⁶ Based on the available research, we believe that there are significant gaps in our understanding about the effects of integrated advertising and marketing techniques on children's and adolescents' decisions, diets and health-related behaviors that should be addressed by further studies.

Children and adolescents are early adopters of new and interactive media. Mobile advertising by companies (including food and beverage companies) is tightly integrated into company marketing campaigns that align with their overall brand strategy. Nearly two-thirds (64 percent) of American adolescents prefer advertising in the form of text messaging and nearly one-half (47 percent) prefer to receive advertising in the form of images via their mobile phones.⁵² Food, beverage and restaurant companies are developing highly sophisticated integrated marketing communications to reach young people. Many companies are using social

media to conduct marketing research on young people to design behavioral targeting of product brands with both healthy and unhealthy nutrition profiles. The interactive food and beverage marketing reaching young people through the new digital media present unique risks to vulnerable adolescents whose needs are not being addressed in the CFBAI program, which focuses on children under 12 years of age.^{6,51}

However, in addition to those unique risks, there are also important opportunities for companies to limit adolescents' exposure to the marketing of high-calorie and nutrient-poor food and beverage products that contribute to unhealthy diets. Limiting teenagers' exposure to the marketing of nutrition-poor foods and beverages on TV is difficult because most popular shows with teens also are popular with adults. However, much of the marketing through new digital media, such as via mobile phones, is more carefully targeted, and companies could avoid targeting adolescents.

The widespread use of mobile and digital media creates an enormous challenge for parents to take full responsibility to effectively provide oversight for young people's media use. The same mobile devices that parents give to their children and adolescents to keep them safe are now being used without parental knowledge or consent to market directly to young people. Companies are now collecting personal information from young people while they are simultaneously advertising to these young consumers.

As the FCC may be aware, the FTC is developing new guidelines to address privacy-related online marketing practices. Among the contemporary marketing techniques that may be affected are behavioral targeting and other data-related approaches. Many of these new FTC proposals could positively impact the online marketing environment targeting young people, especially food and beverage advertising. **The FMC Workgroup urges the FCC to support action by the FTC in this area, and also to work closely with other federal agencies, including the FTC, CDC, National Institutes of Health (NIH) to share and coordinate research on newer forms of marketing techniques and venues, such as digital marketing and interactive social networking sites.**

We also recommend that FCC should formally support FTC proposals to address privacy-related digital marketing issues to children, which will likely be proposed as part of the FTC's current online privacy initiative and its review of the Children's Online Privacy Protection Act (COPPA) in 2010. The FTC is currently engaged in several initiatives designed to protect online privacy and ensure consumer protection of the American public. These include developing ethical codes for behavioral tracking and online target marketing of children and adolescents. Current FTC initiatives to address behavioral advertising and mobile marketing could play a critical role protecting children and adolescents from harmful marketing practices, including food and beverage interactive advertising. The FTC's review of COPPA will help to inform how to best protect children under the age of 13 years from digital marketing practices.⁵³

5. Strengths and Limitations of Media Literacy

Media literacy has the potential to help children and adolescents develop an informed and critical understanding of the nature, techniques, and impact of what they are exposed to through

print, broadcast, and other electronic or digital media. It can help children and adolescents develop skills to become critical thinkers, effective communicators, and civically engaged citizens as they grow into the responsibilities of adulthood.

The IOM Committee on Food Marketing to Children and Youth identified a major challenge to developing an effective media literacy education program for children in kindergarten through grade 12. Most children younger than 8 years do not effectively comprehend the persuasive intent of advertising and marketing messages.^{13,54} Studies have found that children who are 11 years old do not activate their cognitive defenses unless they are explicitly cued.^{55,56,57}

The benefits of media literacy education may require children to reach a certain developmental stage to have the cognitive defenses to differentiate commercial content from information. Given the greater blurring of boundaries between commercial and non-commercial content of new digital media, the age of effective comprehension of persuasive intent of advertisements may be considerably older than that for TV advertising. Young people's activation of cognitive defenses may be more difficult with newer forms of digital media.

Importantly, understanding "persuasive intent" does not protect older children from the effects of advertising. For example in one study, the effect of food advertising on product preferences was not related to age; 11-year-olds were equally influenced as 5-year-olds.⁵⁸ A separate study showed that exposure to a short media literacy video tended to *increase* children's preferences for advertised food products on television.⁵⁹

Adolescents are also vulnerable to food-marketing messages because the part of the adolescent brain that directs impulse control, risk-taking behaviors and maturity of judgment does not fully develop until adulthood.⁶⁰ Adolescents have concerns about their appearance and self-identity and have reduced ability to inhibit delayed gratification and impulsive behaviors.⁶¹ They do not have the cognitive defenses to practice rational decision-making about food and beverage products with unhealthy nutrition profiles, which increases their obesity and chronic-disease risks. They face the dual challenge of growing up in an environment where high-calorie and nutrient-poor foods and beverages are widely available to them and are promoted to them through the new media and marketing ecosystem.⁵¹

The FMC Workgroup recommends that companies eliminate the advertising and marketing of high-calorie and low-nutrient food and beverage products that contribute to unhealthy diets. The FCC, FTC and other federal agencies should not rely on media literacy as the primary strategy to address the marketing of high-calorie and nutrition-poor foods and beverages to children and adolescents. While media literacy is a useful life skill, it is not a substitute for eliminating the advertising and other marketing practices that can undermine children's health and well-being.

6. The First Amendment of the U.S. Constitution and Regulating Food Marketing to Children

Although the First Amendment of the U.S. Constitution sets limits on what the FCC may do to regulate communications over electronic media, the Commission has significant constitutional leeway to restrict advertising and other marketing that targets children. The four-part *Central Hudson* test that governs First Amendment review of “commercial speech” regulation provides that all inherently deceptive speech may freely be regulated, or prohibited outright.⁶² Moreover, regulations directed at safeguarding children in certain media, like broadcast television, are granted additional leeway.⁶³ Indeed, it is likely that the urgency of protecting young people permits the extension of that greater leeway to *all* media targeting children.⁶⁴

As discussed above, studies have established that children ages 8 and younger are incapable of comprehending the persuasive intent of advertising. Accordingly, advertisements for unhealthy foods and beverages that are directed at children may be considered inherently deceptive. That is, there is no plausible way to make the advertisements non-misleading to their intended audience, and they may therefore be regulated without raising First Amendment concerns.⁶⁵

The best scientific judgment now holds that children ages 12 and younger do not possess the capacity to process and understand the persuasive bias intrinsic in advertisements and other marketing messages in the way that adults do.^{54,57} This lack of full comprehension leaves pre-teen children far more vulnerable than their adult counterparts. The proliferation of new marketing techniques in recent years, including neuroscience to explore marketing and messaging techniques that appeal directly to consumers’ subconscious mind,^{66,67} renders even older children more susceptible to marketing. It is very likely that all advertising and marketing targeting children ages 12 and younger could be considered “inherently deceptive” under the *Central Hudson* test and therefore regulated freely by the Commission.

The research discussed above suggests that adolescents are significantly more vulnerable than adults to marketing messages because the part of the brain that directs impulse control, risk-taking and maturity of judgment does not fully develop until adulthood. It may be that adolescents understand how advertising works but they are unable to act on that understanding, which suggests that they require some measure of protection—especially since they are now subject to more pervasive marketing techniques. The Commission has an obligation to protect vulnerable adolescents. Even if advertisements targeting teenagers were found not to fit into the legal definition of “inherently deceptive,” they would not receive the same protections as speech to adults under the First Amendment. The Supreme Court has made clear that the Constitution does not afford “speech” directed at minors the same level of protection as that accorded adult speech.⁶⁸ Accordingly, the Commission should have some leeway to protect adolescents.

To acknowledge that children of all ages merit greater governmental solicitude than adults is not a novel concept. Government regularly recognizes minors’ lack of fully developed judgment and regulates accordingly—from restricting their ability to drive; to prohibiting their purchase of alcohol, tobacco, and firearms; and forbidding them from entering into contracts.

The Supreme Court has offered at least three justifications why the constitutional rights of children cannot be equated with those of adults: (1) the peculiar vulnerability of children, (2) their inability to make critical decisions in an informed and mature manner, and (3) the importance of the parental role in child rearing.⁶⁹ These justifications have informed Supreme Court decisions not only about young children but also about the ability of adolescents to make their own choices.⁷⁰ With the childhood obesity epidemic threatening to make this generation of children the first to have a lifespan shorter than their parents' lifespan, and with the advent of marketing techniques designed specifically to circumvent younger children's limited cognitive defenses or to appeal to adolescents' impulsiveness and irrationality, there is ample justification for the Commission to act.⁷¹

The FCC has the unique ability to protect young people until their cognitive capacities have developed sufficiently to allow them to make the informed choices that are expected of adult participants in a market economy. The First Amendment should not stand in the way of the Commission freely regulating advertising that targets children ages 12 and younger on the basis of these children's inability to understand in a meaningful way the persuasive intent and inherent bias of advertising. Moreover, recent research on adolescent cognitive development argues strongly for at least an investigation by the Commission into whether teens' still-developing brains require—and the First Amendment accordingly permits—government to take additional actions that protect adolescents.

7. Effective Coordination of Government Efforts to Protect Children and Adolescents in an Evolving Digital Media and Marketing Landscape

In 2005, the IOM food marketing report concluded that federal regulations for companies that advertise and market to children will need to evolve at the same pace as emerging techniques used to promote products. Since contemporary food and beverage marketing to children and adolescents is integrated and seamless, government agencies, such as the FCC and FTC must have better oversight for and regulation of food and beverage advertising and marketing practices reaching young people through all communication platforms. There must be close collaboration among regulatory agencies, shared access to proprietary data, and cooperation to reduce the marketing of low-nutrition foods and beverages to children. **We recommend that the FCC coordinate with the FTC to urge companies to adopt and strengthen food marketing policies as outlined above. If voluntary measures are not effective, the agencies should take action within their existing authority and Congress should provide any additional authority required to protect children from the marketing of unhealthy foods.**

Thank you for the opportunity to submit these comments.

Sincerely,

Food Marketing to Children Workgroup *on behalf of:*

American Heart Association
American Public Health Association
Berkeley Media Studies Group

California Pan-Ethnic Health Network
Campaign for a Commercial-Free Childhood (CCFC)
Center for Digital Democracy
Center for Science in the Public Interest
FGE Food & Nutrition Team
National Action Against Obesity (NAAO)
National Policy & Legal Analysis Network to Prevent Childhood Obesity, a project of Public Health Law & Policy
National WIC Association
New York State Healthy Eating and Physical Activity Alliance (NYSHEPA)
Praxis Project
Prevention Institute
Public Good
Public Health Advocacy Institute at Northeastern University School of Law
Public Health Institute
Robert Wood Johnson Foundation Center to Prevent Childhood Obesity
Rudd Center for Food Policy and Obesity, Yale University
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